

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  SDG MACERICH PROPERTIES, L.P. SOUTHRIDGE MALL, DES MOINES, IOWA	DOCKET NO. WRU-00-23
---	----------------------

**ORDER GRANTING PETITION FOR TEMPORARY WAIVER  
OF 199 IAC 20.3(1)**

(Issued June 13, 2000)

**BACKGROUND AND REQUEST FOR WAIVER**

On April 12, 2000, SDG Macerich Properties, L.P. (Macerich), the owners and operators of Southridge Mall (Southridge) in Des Moines, Iowa, filed a petition for temporary waiver of the Utilities Board (Board) rule 199 IAC 20.3(1) (2000), which generally prohibits master metering arrangements for electric service. Macerich requests a waiver that would permit continued use of master metering for the remaining term of its existing leases; however, the electric charges would no longer be subject to retroactive reconciliation. With regard to leases entered into following grant of the waiver, Macerich will include provisions that comply with the Board's master metering rule.

The petition for waiver is part of an effort to resolve an informal complaint proceeding, identified as C-99-73. The complaint was filed by a tenant of Southridge. The tenant's lease specified a method for estimating the tenant's annual electric usage, followed by an annual true-up of that estimate based upon actual usage. In some years, tenants were billed additional amounts if the estimate

was lower than actual usage. If the estimate was high, tenants received a credit. All Southridge leases include this standard lease provision, attached to the petition as Exhibit 1.

Southridge was first occupied in 1975; it was built and operated by GGP Limited Partnership (General Growth). General Growth installed a rooftop cablebus distribution system for electric service to tenants. This type of system can be used for master metering. On March 1, 1998, General Growth sold Southridge to Macerich, which was familiar with the electric distribution system being used at Southridge, primarily because similar systems are used at other malls and shopping centers in the Midwest.

From and after March 1, 1998, Macerich has continued to use the same distribution system and the same (or similar) lease provisions to estimate, calculate, and reconcile the electric charges to tenants in Southridge. Macerich states that it believed in good faith that the leases, and specifically the electric cost recovery provisions of those leases, were consistent with Iowa law.

The utilities section in those leases provides that each tenant's annual electric usage will be estimated in advance using an electrical demand share system, based upon individual tenant improvement plans and as-built loads. Those estimates are then reconciled after the fact based on the tenant's actual usage. The lease also provides as follows:

(c)(I) Should Landlord elect or be required to supply any utility services used or consumed in the Premises, Tenant agrees to reimburse Landlord for the same at a cost not to exceed that which the utility company would have charged Tenant for furnishing such utilities and based on a distribution or other use method for computing the amount of

utility usage. \* \* \* Landlord may, at Landlord's option and on at least thirty (30) days' prior notice to the Tenant, discontinue furnishing any such utility to the Premises; and in such case, Tenant shall contract directly with the public or private service company supplying such utility service for the purchase by Tenant of such utility.

(Petitioner's Exhibit 1.)

Macerich requests a temporary waiver of 199 IAC 20.3(1)"b" to permit continued use of the existing system for estimating utility charges for tenants who are subject to existing leases. Electric utility charges would be set prospectively and will not be subject to retroactive reconciliation. In any leases entered into after the date of the order granting the waiver, Macerich will include utility provisions that comply with Board rules. Thus, as existing leases expire and are renegotiated, the number of non-complying leases will gradually be reduced to zero, at which time the waiver will no longer be necessary.

### **CONSUMER ADVOCATE RESPONSE**

On May 10, 2000, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a response to the petition urging the Board to deny the waiver. Consumer Advocate notes that the purpose of rule 20.3(1)"b" is "to promote the conservation of energy through the process of informing gas and electric customers of their energy consumption and billing such customers for that consumption." Master Metering of Gas and Electric Service, Docket No. RMU-78-7, "Order Adopting Rules," October 4, 1978. Granting the waiver, according to Consumer Advocate, would be contrary to this purpose.

In the informal complaint leading to the petition for waiver, the complainant alleged that Macerich engaged in the resale of electricity to tenants at higher rates than those paid by Macerich. The complainant also alleged that Macerich utilized submeters to measure and reconcile usage on an annual basis. If these allegations are accurate, according to Consumer Advocate, granting the petition for waiver would give Macerich authority to perform functions traditionally undertaken by public utilities subject to regulatory authority.

Consumer Advocate notes that Macerich claims that compliance with 199 IAC 20.3(1)“b” is impractical for existing leases, but Macerich does not explain why its building design cannot or should not be modified to comply with the Board’s individual meter requirement. The fact that Macerich intends to comply with the rule as leases are renegotiated diminishes the claim that it is impractical to comply with respect to existing tenants, argues Consumer Advocate.

Consumer Advocate also points to the Board rulings in Docket No. DRU-99-3, Pointwest Apartments and The Michelson Organization, and Docket No. WRU-97-8, GGP Limited Partnership, in which the Board did not allow the petitioners to allocate utility costs as “additional rents.” In Consumer Advocate’s view, granting the requested waiver in this docket would allow Macerich to allocate utility costs to tenants as “additional rents” in precisely the same manner as the Board rejected in those earlier dockets.

Finally, according to Consumer Advocate, the waiver would allow Macerich to perform essential functions of a public utility, such as disconnection, without

providing the customer rights and remedies established by law for customers served by regulated public utilities.

### **LEGAL REQUIREMENTS AND ANALYSIS**

The Board's rule on electric master metering, 199 IAC 20.3(1)"b," currently provides as follows:

*b.* All electricity delivered to multioccupancy premises where the units are separately rented or owned shall be sold by a utility on the basis of individual meter measurement for each unit except for that electricity used in centralized heating, cooling, water-heating or ventilation systems, where individual metering is impractical, where a facility is designated for elderly or handicapped persons and utility costs constitute part of the operating cost and are not apportioned to individual tenants, or where submetering or resale of service was permitted prior to 1966.

In the case of Southridge, electricity is not being sold on the basis of individual meter measurement. Further, it appears none of the exceptions stated in the rule apply to Southridge. The facility is not specifically designated for elderly or handicapped persons. Submetering was not in place prior to 1966, since Southridge was not occupied until 1975. Southridge might be able to make a case that individual metering is impractical from an economic or legal standpoint, although this position might be undercut by Southridge's existing submetering facilities and Southridge's plans to comply with the Board rule in the future. Both of these facts would tend to indicate it is not impossible to individually meter the tenants, although there could still be reasons that it is "impractical."

On February 15, 2000, the Board issued an order in Docket No. RMU-00-4 proposing to change the master metering rules. The changes are intended merely

to clarify the Board's existing policy regarding individual meter measurement. If adopted, new rule 20.3(1)"b" and "c" would provide:

*b.* Electricity or the benefits thereof delivered to multioccupancy premises where units are separately rented or owned must be sold by the utility on the basis of individual meter measurement for each unit, except in the following instances:

(1) where electricity is used in centralized heating, cooling, or water-heating systems;

(2) where a facility is designated for elderly or handicapped persons; or

(3) where individual metering was not required prior to 1966.

*c.* In all cases in which electricity is not sold on the basis of individual meter measurement to a multioccupancy premise, an end user may not be directly billed for individual electric consumption or the benefits thereof. Any charge for electricity or the benefits derived therefrom may be included only as an unidentified portion of the rent, condominium fee, or similar payment.

These rules are only proposed and are not binding, but it is reasonable to consider the application of these proposed rules to the present circumstances in order to understand how future rules may affect Southridge. It appears Southridge would be in violation of the new rule, if adopted by the Board, unless the exception identified as *b.(1)* would apply. However, even if Southridge were offering centralized facilities to its customers, the existing leases would not meet the further requirement of section *c*, above, because Southridge is separately billing the tenants for electric service.

Even if Macerich qualified for any of the exceptions to the existing rule or the proposed rule (if adopted), Macerich is in violation of the prohibition against direct

billing and is not structuring the lease to include electricity charges as an unidentified part of the rent. Therefore, Macerich has requested this temporary waiver. It is the temporary nature of this request that distinguishes this request from the other decisions cited by Consumer Advocate. Macerich is not trying to justify a permanent departure from the rule; instead, it seeks only to have the time for a reasonable transition to compliance, without unnecessary disruption of existing leases. The Board finds this a reasonable approach to resolving this situation and bringing Southridge into compliance, especially when compared to wholesale revision of all leases on short notice. Sudden, major changes could require immediate renegotiation of many leases and rewiring of many tenant spaces, a potentially expensive and inefficient approach. Permitting the changes on a gradual basis offers the potential for cost savings for both the landlord and the tenants.

Consumer Advocate also objects to the "utilities" section of Southridge's lease agreement, arguing the lease gives Macerich the enforcement authority of a public utility without the obligation to provide corresponding customer rights and remedies established by law. However, the same situation exists anytime a building is master metered, even when it is done in compliance with the Board's rule. In those situations, the tenants' protection must be in the lease agreements they negotiate with the landlord. The same applies here, for the remaining term of each lease. The Board notes that Southridge leases have contained the same or similar utility provisions since 1975 without causing any prior complaints to the

Board. Based on this history, it is unlikely that any untoward results will occur as a result of temporarily continuing the status quo.

The Board finds the temporary waiver request is reasonable and should be granted. The immediate elimination of the retroactive reconciliation process will eliminate the major problem underlying the complaint in C-99-73. The practice of specifically identifying electric costs in each of the leases will be corrected as each lease is replaced. This should provide an opportunity for an orderly transition to compliance with the Board's rules, without unnecessary disruption of the existing landlord-tenant relationships.

#### **ORDERING CLAUSE**

##### **IT IS THEREFORE ORDERED:**

The petition for temporary waiver filed by SDG Macerich, LP, on April 12, 2000, and considered by the Board in Docket No. WRU-00-23, is granted. Board rule 199 IAC 20.3(1) is temporarily waived, as described in the petition.

#### **UTILITIES BOARD**

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary, Deputy

/s/ Diane Munns

Dated at Des Moines, Iowa, this 13<sup>th</sup> day of June, 2000.